

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

HOUSTON POLICE OFFICERS'	.	CASE NO. 4:24-CR-478
UNION,	.	
	.	
PLAINTIFF,	.	
	.	HOUSTON, TEXAS
V.	.	TUESDAY, AUGUST 6, 2024
	.	10:38 A.M. TO 11:20 A.M.
KROGER TEXAS L.P.,	.	
	.	
DEFENDANT.	.	
. . . . .	.	

INITIAL CONFERENCE

BEFORE THE HONORABLE CHARLES ESKRIDGE  
UNITED STATES DISTRICT JUDGE

APPEARANCES:	SEE NEXT PAGE
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Appearances:

For the PLAINTIFF:	JARRETT L. ELLZEY, ESQ. Hughes Ellzey LLP 1105 Milford Street Houston, TX 77006
For the DEFENDANT:	VALERIE A. HENDERSON, ESQ. BRUCE A. MCMULLEN, ESQ. MARY W. TULLIS, ESQ. Baker, Donelson, Bearman, Caldwell & Berkowitz, PC 1301 McKinney Street, Suite 3700 Houston, TX 77010
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1 Houston, Texas; Tuesday, August 6, 2024; 10:38 a.m.

2 **UNITED STATES MARSHAL:** All rise.

3 The United States District Court for the Southern  
4 District of Texas is now in session. The Honorable Charles  
5 Eskridge presiding. God save the United States and this  
6 Honorable Court.

7 **THE COURT:** Thanks, everyone. Please be seated.

8 **(Pause in the proceeding.)**

9 **THE COURT:** All right. I call for hearing *Civil Case*  
10 *24-478, Houston Police Officers' Union versus Kroger Texas L.P.*  
11 Can I get appearance from counsel, please.

12 **MR. ELLZEY:** Good morning, your Honor. Jarrett  
13 Ellzey on behalf of the Plaintiff.

14 **THE COURT:** Thank you.

15 **MS. HENDERSON:** Good morning. Valerie Henderson,  
16 Bruce McMullen, and Mary Tullis on behalf of the Defendant.

17 **THE COURT:** Welcome. Are you lead on this Miss --

18 **MS. HENDERSON:** Yes.

19 **THE COURT:** -- Henderson?

20 **MS. HENDERSON:** Yes.

21 **THE COURT:** Okay. Thank you. all.

22 A note before we start. I'm the miscellaneous judge  
23 this month. And there is a TRO that's pending that I may need  
24 to step off the bench and take a Zoom to decide whether to  
25 foreclose a -- a more -- to halt a mortgage foreclosure.

1 I think it's been handled. But anyways, I may take a  
2 brief adjournment for that if necessary.

3 All right. I have reviewed the materials. And  
4 I -- obviously, I do want to take up the motion. As to the  
5 joint discovery and case management plan, it's an interesting  
6 action underlying on all the facts.

7 Is there anything that -- I don't know that I noted  
8 anything, disagreements between the parties, other than what's  
9 in the pending motions. Is there anything that we need to  
10 address on the joint discovery, case management plan?

11 **MR. ELLZEY:** Your Honor, there are no disagreements.  
12 But I -- I would like to correct what is in the -- the joint  
13 discovery, case management plan.

14 I was looking back over it --

15 **THE COURT:** Sure.

16 **MR. ELLZEY:** -- and I apologize to the Court  
17 for -- for allowing this to get filed without these items in  
18 there.

19 With respect to the additional parties --

20 **THE COURT:** Uh-huh.

21 **MR. ELLZEY:** -- there may be. And it -- it's  
22 possible that -- that the bank, the underlying bank that funds  
23 these cards --

24 **THE COURT:** Yeah. Right.

25 **MR. ELLZEY:** -- could be a party.

1           **THE COURT:** Uh-huh.

2           **MR. ELLZEY:** So we could -- we could correct the case  
3 management plan if necessary.

4           The second is -- is the discovery that's been  
5 conducted to date. Just normally, none would be conducted  
6 prior to this hearing. However, given thee the Court's initial  
7 order requiring a class certification motion filed, I believe,  
8 it was in September, my firm got busy and we sent out a  
9 subpoena to U.S. Bank for Kroger then appeared in the case.

10          **THE COURT:** Uh-huh.

11          **MR. ELLZEY:** Questioning the appropriateness of that.  
12 But trying to follow the Court's order, we felt like we had to  
13 get discovery going.

14          We have not followed-up on that. U.S. Bank has not  
15 answered. But just wanted to correct the record. There has  
16 been a discovery item completed, but not followed-up on.

17          **THE COURT:** Have you all been -- so, the completion  
18 of discovery related to class certification was end of July.  
19 Have you all been undertaking much, if any, discovery on that?

20          **MS. HENDERSON:** No, your Honor. And I think that  
21 those --

22          **THE COURT:** All right.

23          **MS. HENDERSON:** -- deadlines were continued, due to  
24 this Motion to Dismiss that's pending.

25          **THE COURT:** Okay. And so that's what I was

1 wondering. Because I was about to do that if it hadn't already  
2 been done. I didn't look back at my prior orders.

3 So has that been stayed? Because if so, then we'll  
4 just reset it. I'll -- I'll -- I'll tip my hand here on the  
5 motion.

6 I think that at the end of the day, there's going to  
7 be some repleading allowed. And then I might get these motions  
8 again to decide in a better, and I think you want to correct  
9 some things in your -- or update and add things, to your  
10 pleading is my sense.

11 And so, that's kind of where -- I -- I want to go  
12 through all the issues with you. But that's kind of where I am  
13 at that point, which means we'd hold off, I think, on class  
14 certification and discovery. And I'd reset that later as  
15 needed.

16 **MR. ELLZEY:** I think that's accurate, your Honor.  
17 And actually, the first words out of my mouth in the context of  
18 a response to their motion was going to be -- or request to the  
19 Court, for leave --

20 **THE COURT:** Uh-huh.

21 **MR. ELLZEY:** -- you know, to file an amended  
22 complaint. Because your Honor's correct. There's some -- some  
23 items that need to be in there that are not in there. And some  
24 facts need to be added --

25 **THE COURT:** Okay.

1           **MR. ELLZEY:** -- and refined.

2           However, it is an interesting case. It's -- it's an  
3 atypical narrative. So it's -- it's difficult to say. Too  
4 busy -- the breach of contract --

5           **THE COURT:** In -- in what -- in what way? I see --

6           **MR. ELLZEY:** Right.

7           **THE COURT:** Pretty much everything I see, I'm sort of  
8 like, well, I've never seen that before.

9           **MR. ELLZEY:** Right.

10          **THE COURT:** So --

11          **MR. ELLZEY:** So, it's -- given what we're up against,  
12 I mean, it -- we would -- I don't want to get in a position  
13 where I'm doing a lot of guess work --

14          **THE COURT:** Uh-huh.

15          **MR. ELLZEY:** -- at the pleading stage.

16          And that's -- that's -- we're kind of in a catch-22  
17 here. Obviously, we have to allege enough facts to support our  
18 claims. We have to bring the proper claims. I understand  
19 that.

20          However, we don't know exactly what happened behind  
21 the curtain with respect to the -- the -- the hacking we're  
22 alleging, or the -- the way the cards were compromised that  
23 led --

24          **THE COURT:** And this was as to four -- is it four  
25 cards that were compromised?

1           **MR. ELLZEY:** Four cards. However, we're aware that  
2 this is -- it's a broader issue than just the four cards.

3           **THE COURT:** Sure.

4           **MR. ELLZEY:** Yes.

5           **THE COURT:** But as to the Houston Police Officers'  
6 Union it was four cards.

7           **MR. ELLZEY:** Correct, your Honor.

8           **THE COURT:** A hundred dollars each?

9           **MR. ELLZEY:** Hundred dollars each.

10          **THE COURT:** Okay. And there had been -- I haven't  
11 seen anything clear about it. It seems to me like Kroger has  
12 said, have there been refunds? Or is there -- what's -- what's  
13 happened to -- Kroger's not disputing --

14          **(Pause in the proceeding.)**

15          **THE COURT:** Well, maybe that's not right. Cause  
16 it -- that goes to substances. I know what the allegations of  
17 the complaint are.

18               Does -- but Kroger surely got the cards back into its  
19 possession at someone point, and has already looked at them,  
20 right? And -- or looked at its records and they were issued  
21 with \$100. And when they were attempted to be used, the money  
22 was not there.

23               Is that basically right?

24          **MS. HENDERSON:** The -- when the cards left Kroger  
25 they had the \$100 --



1           **THE COURT:** Okay.

2           **MS. HENDERSON:** -- on each of the cards.

3           As to your first question, your Honor, the -- Kroger  
4 offered to replace the cards with new fully-loaded --

5           **THE COURT:** New cards.

6           **MS. HENDERSON:** -- cards.

7           **THE COURT:** Fully-loaded. Yeah.

8           **(Pause in the proceeding.)**

9           **MR. ELLZEY:** At -- all --

10          **THE COURT:** Offered. Or -- and was that accepted, or  
11 was it not? Or do you know?

12          **MS. HENDERSON:** It was not accepted to my knowledge.

13          **THE COURT:** Okay.

14          **(Pause in the proceeding.)**

15          **THE COURT:** All right.

16          **(Pause in the proceeding.)**

17          **THE COURT:** Okay. Um, all right. So who are the  
18 other parties that you might want to bring in?

19          **MR. ELLZEY:** Possibly U.S. Bank.

20          **THE COURT:** Is that the one that backs all of these  
21 Visa gift cards?

22          **MR. ELLZEY:** Correct, your Honor. And -- and  
23 discovery would be required before we can make that  
24 determination.

25          **THE COURT:** Why's that?

1           **MR. ELLZEY:** Well, I -- I -- I'm not exactly sure if  
2 they have some responsibility, U.S. Bank has responsibility  
3 with respect to -- to the -- to securing the cards, I know.

4           But we're alleging that this like an electronic  
5 hack --

6           **THE COURT:** Right.

7           **MR. ELLZEY:** -- just so know.

8           While Kroger was in possession, and when -- when the  
9 consumer goes to use the card, that's -- whatever  
10 is -- is -- devices is placed on that account, card is swiped,  
11 the money goes elsewhere. So the card is emptied.

12           So while the card may leave Studemont Kroger  
13 premises, or any other Kroger premises, fully-funded at the  
14 time of purchase, the allegation is the money's drained and  
15 sent to an account of whoever the pirates are.

16           **THE COURT:** Sure.

17           Is -- is the hack that it's like something just  
18 somebody clever and entirely independent has figured out how to  
19 do this? Or is the supposition that there's something going on  
20 inside that knows that -- cause I just don't -- I don't  
21 understand how that's happening if it's -- like if I knew  
22 anything about computers, that I could go in and look at a Visa  
23 gift card and take that number.

24           And then from the outside, know when it's been loaded  
25 and how to go get that money. But that Kroger with its systems

1 and things, is obviously able to do that, and tracking that  
2 because it's the one loading the card in the first place.

3 I mean, is your supposition that it's somebody with  
4 access to that system that's doing it?

5 **MR. ELLZEY:** Somebody with access to the card numbers  
6 clearly. And then what happens beyond that is what -- what  
7 we're going to need to determine during discovery.

8 **THE COURT:** Uh-huh.

9 **MR. ELLZEY:** That's -- it's -- that's the -- that's  
10 the issue behind the curtain.

11 **THE COURT:** And do you know how -- is this a  
12 widespread issue? And --

13 **MR. ELLZEY:** It's personally happened to me four  
14 times. But -- and my family. But, yes, your Honor. If  
15 you -- if you -- if you do a little digging, and you don't have  
16 to dig very deep, it is not --

17 **THE COURT:** Well let me say this. That -- is that  
18 vis-à-vis Kroger? Or is that vis-a-vis -- oh, by the way, for  
19 conflicts purposes. I shopped at Kroger last night.

20 I don't suppose that's a conflict, right?

21 **MS. HENDERSON:** I think you're fine, your Honor.

22 **THE COURT:** Okay.

23 **MS. HENDERSON:** That's for letting us --

24 **THE COURT:** Good.

25 **MS. HENDERSON:** -- know.

1           **MR. ELLZEY:** Thank you, your Honor. No objection.

2           **THE COURT:** Um, no. Is it your issue was that Kroger  
3 specific? Or is this just -- it just happened to you like at a  
4 Walgreens, or wherever it is that you purchased it?

5           **MR. ELLZEY:** It's a retail problem.

6           **THE COURT:** Okay.

7           **MR. ELLZEY:** It -- it's not a Kroger problem.

8           **THE COURT:** Interesting.

9           **MR. ELLZEY:** Unfortunately, this incident involved  
10 Kroger.

11          **THE COURT:** Right.

12          **MR. ELLZEY:** And -- and additionally --

13          **THE COURT:** Has your firm --

14          **MR. ELLZEY:** -- it's at Kroger.

15          **THE COURT:** Has your firm pursued these -- usually on  
16 like doing an ERISA class action right now. And lots of courts  
17 have seen lots of cases like this that started being brought  
18 that you're aware of? Or maybe that your firm is doing?

19          **MR. ELLZEY:** We -- my firm has not initiated any  
20 other cases.

21               I'm a little tiny firm --

22          **THE COURT:** Okay.

23          **MR. ELLZEY:** -- on Montrose. But -- for now,  
24 merging. But you don't need to know.

25          **THE COURT:** Good.

1           **MR. ELLZEY:** So, to answer your question, your Honor,  
2 there is another case that I'm aware of. And it involves Visa.  
3 It's a Visa card.

4           **THE COURT:** Right.

5           **MR. ELLZEY:** But that -- that case is going to be  
6 moved into arbitration, based on the information I have and my  
7 knowledge of how Visa's terms and conditions work.

8           **THE COURT:** Well, like the back of whatever the cards  
9 say.

10           I mean, do these cards require arbitration? Is that  
11 something that's -- that comes up? Is that even something that  
12 Kroger asserts? Or is that like a Visa-related issue?

13           Cause you're just sort of like the middle-man on  
14 the --

15           **MS. HENDERSON:** Right, your Honor.

16           **THE COURT:** -- that issue.

17           **MS. HENDERSON:** And that -- you're question raises a  
18 broader issue that we have with this case as a whole.

19           **THE COURT:** Yeah.

20           **MS. HENDERSON:** That the facts as alleged to not  
21 connect any bad actions directly to Kroger.

22           He's talking about bringing in U.S. Bank after  
23 additional discovery is done to even figure out if U.S. Bank  
24 did anything wrong. There's no facts currently alleged as to  
25 what Kroger, if anything, Kroger did wrong.

1 As to the arbitration question, that likely is  
2 something that goes to the bank, because the -- the cards were  
3 banked by U.S. Bank and issued by U.S. Bank. They just happen  
4 to be sold by Kroger and purchased by the Plaintiff at Kroger.

5 **THE COURT:** Uh-huh.

6 **MS. HENDERSON:** I think --

7 **THE COURT:** And are you aware of any other class  
8 actions that have been brought -- I'm just saying. Like once  
9 class actions start to get tractions, lots and lots of them are  
10 seen.

11 Are you aware of any other courts addressing this  
12 particular type of negligence, breach of contract, fraud,  
13 whatever rubric it's been brought under?

14 **MS. HENDERSON:** When we received this case, we looked  
15 into that. And the cases that we found were against the U.S.  
16 Banks and the financial institutions --

17 **THE COURT:** And not against the one --

18 **MS. HENDERSON:** -- that back the card.

19 **THE COURT:** -- that was. Okay.

20 **MS. HENDERSON:** That's -- that's what we found, your  
21 Honor. Yes.

22 **(Pause in the proceeding.)**

23 **THE COURT:** Okay.

24 **MR. ELLZEY:** And, your Honor, if I may.

25 **THE COURT:** Yeah.

1           **MR. ELLZEY:** The -- the crux of our complaint against  
2 Kroger is -- is the foreseeability aspect of this whole  
3 problem, right?

4           **THE COURT:** But what -- what does that mean they  
5 should be doing?

6           Because from what I'm hearing about that, is -- I  
7 mean, I understand that you don't know what happened or who did  
8 it. But from what I'm hearing is it's more likely, if it's an  
9 inside job, it's more likely that it's from U.S. Bank personnel  
10 or people that are being allowed access through that, as  
11 opposed to through Kroger.

12           And so, I know that you're, you know, kind of  
13 shooting at the dark. And the cards were purchased from  
14 Kroger. But, you know, at the end of the day, it's -- it's  
15 hard to say at this point who's responsible. And I -- I hear  
16 what Kroger's saying about it.

17           **MR. ELLZEY:** I understand. Our position is Kroger  
18 knew, or should have known, about the -- about the issue. And  
19 should have done more to secure the cards. Okay?

20           So if it turns out, your Honor, that this is a U.S.  
21 Bank problem, or a Visa problem, and -- and there's some  
22 insider at U.S. Bank that's selling lists of -- of card  
23 numbers, Kroger's out in my opinion.

24           **THE COURT:** Then they're supposed to keep the cards,  
25 what, behind plastic cases?

1           **MR. ELLZEY:** Well they do that for their razors and  
2 products that --

3           **THE COURT:** Sure.

4           **MR. ELLZEY:** -- in -- in a loss prevention context.

5           **THE COURT:** But that's -- but those are, I mean, but  
6 in terms of like, negligence, they do that do avoid shrinkage  
7 as in shoplifters coming in and taking those type of like  
8 physical things --

9           **MR. ELLZEY:** Right.

10          **THE COURT:** -- off the rack.

11           A Visa card that's just on a display rack is  
12 worthless. Nobody's going to take that. It's only got value  
13 once you take it to the register and it gets loaded up with  
14 money.

15           So, I mean, they're going to be saying well, we don't  
16 lock it up, because there's no intrinsic value to that card as  
17 it's displayed on the shelf. Do I have that right?

18          **MS. HENDERSON:** Yes, your Honor. And the trickier  
19 part of this case is that the two cards they have presented in  
20 their complaint that were drained, were not drained until  
21 almost two months --

22          **THE COURT:** Right.

23          **MS. HENDERSON:** -- after they were purchased from  
24 Kroger.

25          **THE COURT:** Right.



1           **MS. HENDERSON:** So it's even more removed than really  
2 what we've been talking about so far.

3           **(Pause in the proceeding.)**

4           **THE COURT:** Okay.

5           **MR. ELLZEY:** Your Honor, I would argue that  
6 the -- the value of the card is the -- is the card itself with  
7 a number printed on it.

8           **THE COURT:** Uh-huh.

9           **MR. ELLZEY:** You know, if -- if we are correct in our  
10 allegations, the number has value. And if Kroger knows that  
11 someone's --

12           **THE COURT:** Scanning it. And --

13           **MR. ELLZEY:** -- scanning it.

14           **THE COURT:** Taking pictures of it, whatever.

15           **MR. ELLZEY:** Yes. Somehow getting the numbers off  
16 that, then --

17           **THE COURT:** Okay.

18           **MR. ELLZEY:** -- I believe they have a duty to the  
19 consumer because they know the consumer's going to put money on  
20 it. And it will one day be drained when they try to use it.

21           **THE COURT:** Yeah. Okay. All right. I see that  
22 theory. I see what you're saying.

23           Okay. So --

24           **(Pause in the proceeding.)**

25           **THE COURT:** Anything else on the joint discovery and

1 case management plan? We've obviously moved on to the motion.  
2 And I'm going to continue in that regard, unless there is  
3 anything else that anybody wanted to resolve in advance.

4 **MR. ELLZEY:** Nothing further. Just those two items.

5 **THE COURT:** Okay. All right. So then as --

6 **MS. HENDERSON:** Your Honor?

7 **THE COURT:** Yes.

8 **MS. HENDERSON:** Sorry. One thing.

9 I think our plan noted that we were going to exchange  
10 initial disclosures already. But we have not to -- with all  
11 candor to the Court. I think mostly because the other  
12 discovery deadlines had been extended.

13 So I just wanted to note that. And to be --

14 **THE COURT:** I noticed that yesterday.

15 **MS. HENDERSON:** -- do that. I'm sorry?

16 **THE COURT:** Is there any reason not to do initial  
17 disclosures? I'm not even sure what a --

18 **MS. HENDERSON:** I think the issues aren't outlined  
19 clear enough for Kroger to know what we would be disclosing at  
20 this point, given all of the arguments we have in our Motion to  
21 Dismiss.

22 **(Pause in the proceeding.)**

23 **THE COURT:** Okay. Remind me of that when we are  
24 setting what the schedule's going to be at the conclusion of  
25 the hearing.

1           Okay. All right.

2           **(Pause in the proceeding.)**

3           **THE COURT:** All right.

4           **(Pause in the proceeding.)**

5           **THE COURT:** I'm just looking at the JDC and P just  
6 caught my notes.

7           So there's also a law firm listed there. Tom Kirker  
8 (phonetic) is that someone that's -- should be designated as  
9 counsel on the case?

10          **MR. ELLZEY:** I don't believe so, your Honor.

11          **THE COURT:** Okay.

12          **MR. ELLZEY:** Tom Kirker is not going to be appearing  
13 before the Court.

14          **THE COURT:** Okay.

15          **MR. ELLZEY:** If -- if the Court requires his  
16 appearance, a formal appearance, I can facilitate that.

17          **THE COURT:** Is that the Kirker that was with Williams  
18 Bailey and all of --

19          **MR. ELLZEY:** It's his son.

20          **THE COURT:** That's his son. Really?

21          **MR. ELLZEY:** Steve Kirker's son.

22          **THE COURT:** Okay. Steve Kirker. That's who it was.  
23 Okay.

24          **MR. ELLZEY:** Yes, your Honor.

25          **THE COURT:** Interesting. All right.

1           **(Pause in the proceeding.)**

2           **THE COURT:** All right. So on the motion, let's turn  
3 to that.

4           **(Pause in the proceeding.)**

5           **THE COURT:** We have claims of --

6           **(Pause in the proceeding.)**

7           **THE COURT:** Let me get to your causes of action in  
8 the complaint.

9           The first count is negligence. Second count is  
10 contract. And the third count is unjust enrichment. As to  
11 contract, is that something that was withdrawn or not responded  
12 to in the response -- I mean, is -- is contract claim withdrawn  
13 somehow? Or --

14          **MR. ELLZEY:** It --

15          **THE COURT:** What do you want to do with that claim?

16          **MR. ELLZEY:** It is -- it is not withdrawn at this  
17 time, your Honor. We -- we do plan to add a claim. I think we  
18 have a breach of warranty claim.

19          **THE COURT:** And that breach of warranty.

20          **MR. ELLZEY:** And -- and that -- may obviate the need  
21 to keep the contract claim in there.

22           But we -- we do think we have a grounds for breach of  
23 contract claim --

24          **THE COURT:** Okay.

25          **MR. ELLZEY:** -- based on facts.

1           **THE COURT:** The, um --

2           **(Pause in the proceeding.)**

3           **THE COURT:** Does the -- does the response have a  
4 response on the contract claim?

5           **MS. HENDERSON:** No, your Honor. And they say there  
6 was no contract between the parties that covers the losses.

7           **THE COURT:** That's what I -- and where was that? I  
8 had that note. I can't --

9           **(Pause in the proceeding.)**

10          **THE COURT:** Although, instead of a contract about  
11 that, you want to say that there was a -- that Kroger had a  
12 warranty, Mr. Ellzey.

13          **MR. ELLZEY:** I think that's --

14          **THE COURT:** A warranty as to that card and --

15          **MR. ELLZEY:** Correct.

16          **THE COURT:** -- it's fit for its intended purpose or  
17 whatever the warranty would be.

18          **MR. ELLZEY:** Correct, your Honor. I think that's the  
19 more appropriate claim.

20          **THE COURT:** All right.

21          **(Pause in the proceeding.)**

22          **THE COURT:** Okay. Um, because I was thinking of that  
23 in terms of, when I was talking with my law clerk about it,  
24 there is the Economic Loss Doctrine that was asserted that is  
25 asserted as to the negligence claim.

1 But then in the response, I didn't see anything  
2 trying to justify the contract claim. So if there was not a  
3 contract claim, I don't know that the Economic Loss Doctrine, I  
4 think you could still argue it that well, even if they're not  
5 pleading it, this actually was a contract.

6 But I wonder how the Economic Loss Doctrine -- it may  
7 line up exactly the same as -- as your argument, even if it's a  
8 breach of warranty claim. But we don't have it teed up that  
9 way, yet. Is that --

10 **MS. HENDERSON:** Uh-huh.

11 **THE COURT:** -- right?

12 **MS. HENDERSON:** Yes.

13 **THE COURT:** I mean, obviously, it wasn't pleaded that  
14 way.

15 **MS. HENDERSON:** Yes.

16 **THE COURT:** So what are -- what are your thoughts on  
17 that?

18 **MS. HENDERSON:** It was --

19 **THE COURT:** Economic Loss Doctrine at this point,  
20 noting that the contract claim, as pleaded is -- is not what  
21 Plaintiffs are intending to go forward.

22 And, in fact, I'm dismissing that claim as pleaded.  
23 That's different than whether there will be a -- and it's being  
24 dismissed because there wasn't a response on that point trying  
25 to defend it.

1 But there is the idea that you want to bring a breach  
2 of warrant claim instead.

3 **MR. ELLZEY:** Correct, your Honor.

4 **MS. HENDERSON:** Uh-huh.

5 **THE COURT:** Okay.

6 **MS. HENDERSON:** Uh-huh.

7 **THE COURT:** So Miss Henderson, you can react to that  
8 on your feet, or just say I'd have to think about that when I  
9 see what the breach of warranty claim is.

10 **MS. HENDERSON:** Well, I would have to see what the  
11 breach of warranty claim is. But as to the economic loss, I  
12 mean, I think that the -- the negligence claim would still be  
13 barred based on economic loss.

14 Because the -- the Plaintiff has not alleged anything  
15 that -- any damages outside of the \$400 that they were not able  
16 to use on these gift cards. They haven't alleged any damages,  
17 personal injury damages, beyond the loss of use of these gift  
18 cards.

19 **THE COURT:** Yeah. That was --

20 **(Pause in the proceeding.)**

21 **THE COURT:** So the pleading for damages in the  
22 complaint was as to loss of use damages, actual damages, treble  
23 damages, exemplary damages.

24 **(Pause in the proceeding.)**

25 **THE COURT:** There is mental -- it says mental

1 anguish.

2           **MS. HENDERSON:** Well, and, your Honor, as to mental  
3 anguish, I mean, this isn't --

4           **THE COURT:** And then it -- and -- and then there's  
5 more like in the briefing loss of joy, and loss of positive  
6 emotions, which I wonder how it's a corporation. I'm -- I'm  
7 wondering how it's experiencing these emotions.

8           And there may be law that precludes you, since we're  
9 talking about this being purchased by an entity, not by a  
10 particular persons. There's that issue.

11           **MS. HENDERSON:** Yes.

12           **THE COURT:** Is that what you were going to?

13           **MS. HENDERSON:** Yes.

14           **THE COURT:** Okay. Um --

15           (Pause in the proceeding.)

16           **THE COURT:** All right.

17           (Pause in the proceeding.)

18           **THE COURT:** I have concerns --

19           (Pause in the proceeding.)

20           **THE COURT:** It's going to depend on, I'll say this.  
21 I think that the negligence claim --

22           (Pause in the proceeding.)

23           **THE COURT:** -- has problems under the Economic Loss  
24 Doctrine. I don't know if that's curable under a warranty  
25 claim. But maybe it lines up differently.



1 All I'm saying is, pay attention to that in  
2 repleading it, as to what the damages might be that are  
3 different than the economic damages associated with a breach of  
4 warranty.

5 Because right now, it's really what's happened is the  
6 loss of the use of the gift cards, which were supposed to be  
7 for a certain value of money, and the warranty's going to be  
8 saying, in -- in essence, that money should have been there  
9 when I was using it and it wasn't.

10 And so the damages would be that. And so, I've seen  
11 some creative pleading that somehow sometimes gets a negligence  
12 claim pleaded in that regard. I think it's going to be tough.

13 **MR. ELLZEY:** Right.

14 **(Pause in the proceeding.)**

15 **THE COURT:** But I do think that you might be able to  
16 state a warranty claim. So, I -- I can at least conceive with  
17 the theory of what you're saying is going on behind the scenes,  
18 and how it should have been secured, and all, that that could  
19 add up to that's part of the warranty that was given.

20 **MR. ELLZEY:** I -- I think I'm not a good business  
21 manager. Because I allowed my associate, we debated about  
22 this. And he convinced me to stick with the negligence claim.  
23 We rolled with it and here we are.

24 **THE COURT:** Yeah.

25 **MR. ELLZEY:** And -- and I -- I've always felt it's

1 more of a warranty case.

2 **THE COURT:** Okay.

3 **MR. ELLZEY:** And -- and I -- I -- I feel like it  
4 needs to be re-pled that way.

5 **THE COURT:** Well, you know --

6 **(Pause in the proceeding.)**

7 **THE COURT:** I think your associate's fine.

8 **MR. ELLZEY:** He's really smart.

9 **THE COURT:** Yeah. Yeah. No.

10 **MR. ELLZEY:** That's why I listened to him.

11 **THE COURT:** And -- and -- that's --

12 **MR. ELLZEY:** Yeah.

13 **THE COURT:** -- on the Plaintiff's side.

14 **(Pause in the proceeding.)**

15 **THE COURT:** It's not bad faith.

16 And so -- and you never know -- and you don't know  
17 enough facts about what you're looking at. And so, like on the  
18 merits of what you're saying, that's always the different  
19 thing, too, I think when young lawyers are looking at it in  
20 terms of can we line this up to this specific elements of  
21 negligence. Maybe you could. But then Economic Loss Doctrine  
22 is just something that kind of makes that beside the point.

23 And it may end up being beside the point because of  
24 Economic Loss Doctrine.

25 **(Pause in the proceeding.)**

1                   **MR. ELLZEY:** Understood.

2                   **THE COURT:** The, um --

3                   **(Pause in the proceeding.)**

4                   **THE COURT:** On the injury.

5                   **(Pause in the proceeding.)**

6                   **THE COURT:** If -- so you made an offer to make them  
7 whole, which was refused as to that.

8                   **(Pause in the proceeding.)**

9                   **THE COURT:** So I -- you'd at least be having a  
10 defense of failure to mitigate damages, or whatever, because  
11 you tried to make them whole.

12                   **MS. HENDERSON:** Uh-huh.

13                   **THE COURT:** Are you able to use something like that  
14 towards even a standing argument as to injury and fact. You  
15 just weren't even injured in fact, because to the extent that  
16 you said you were injured, we said we're sorry. Here's all of  
17 your money.

18                   And maybe that's part of what you would say your  
19 warranty was. That it's like gosh, if -- cause usually on a  
20 warranty you have a chance to make it right.

21                   **MS. HENDERSON:** Uh-huh.

22                   **THE COURT:** And so, does -- is that able to parlay,  
23 though, into a standing argument? Or is it just like a  
24 affirmative defense?

25                   **MS. HENDERSON:** It's a standing argument, your Honor.

1 And there's case law from the Southern District that says that  
2 an offer of complete relief will moot a plaintiff's claims.

3 **THE COURT:** And is that also -- in a -- in a class  
4 context as well?

5 Cause I know there's like expedient uses of that to  
6 just serially remove potential named plaintiffs without  
7 addressing the larger problem. Did you cite any cases that  
8 have that context in mind?

9 Cause this is pleaded as a class action.

10 **MS. HENDERSON:** Correct, your Honor.

11 The cases that I cited were not class actions to my  
12 knowledge. However, the lead plaintiff has to have standing.  
13 And based on what Plaintiff's counsel has said today, they have  
14 to do a lot of figuring out --

15 **THE COURT:** Yep.

16 **MS. HENDERSON:** -- to see where this case is even  
17 going to go, if there's any other --

18 **THE COURT:** I --

19 **MS. HENDERSON:** -- potential plaintiffs.

20 **THE COURT:** I know exactly what you're saying. The  
21 lead Plaintiff does need to have standing.

22 But on the flip side in a class action, you can't  
23 incentivize that to Defendants to say, well let's just keep  
24 picking off, you know, in a 40,000 member class, let's just  
25 keep picking off one at a time. Cause we're happy to spend 50

1 to \$100 again, and again, and again and never address the  
2 bigger.

3 So, I'm not saying that it's wrong. I'm just saying  
4 on re-briefing that --

5 **MS. HENDERSON:** Uh-huh.

6 **THE COURT:** -- look at it from the class context.

7 **MS. HENDERSON:** Will do, your Honor.

8 And I do think that the distinguishing factor in this  
9 case is that the offer to -- for the Plaintiff to be made whole  
10 was -- occurred prior to this --

11 **THE COURT:** Prior to --

12 **MS. HENDERSON:** -- being a --

13 **THE COURT:** -- the suit.

14 **MS. HENDERSON:** -- class action.

15 **THE COURT:** I understand that as well.

16 **MS. HENDERSON:** Yes.

17 **THE COURT:** Yep.

18 **MR. ELLZEY:** Your --

19 **THE COURT:** Which -- which may make a difference.

20 **MR. ELLZEY:** I'm sorry. I didn't mean to interrupt,  
21 your Honor.

22 **THE COURT:** Yeah. Go ahead.

23 **MR. ELLZEY:** Your Honor, I would love to brief this  
24 issue. Because Campbell Ewalt Case (phonetic), United States  
25 Supreme Court, 2016, is, I mean, it's -- it's dispositive on

1 this issue.

2 **THE COURT:** Okay.

3 **MR. ELLZEY:** An offer of judgment even, formal offer  
4 of judgment, not even an informal settlement offer, does not  
5 moot either the named Plaintiff's claims or the class'  
6 claims --

7 **THE COURT:** Yeah.

8 **MR. ELLZEY:** -- for reasons stated in the opinion.  
9 To paraphrase, it's -- Plaintiffs still have the  
10 right to have his or her day in court.

11 **THE COURT:** Uh-huh.

12 **MR. ELLZEY:** And certainly, the class can't, you  
13 know, the class can't evaporate based on what would, you know,  
14 it's way that they didn't do that here.

15 I think they -- they had good intentions of  
16 refunding.

17 **THE COURT:** Yeah.

18 **MR. ELLZEY:** Kroger did these Plaintiffs.

19 But -- but a common defense tactic in a class action  
20 litigation is --

21 **THE COURT:** Is what I just said.

22 **MR. ELLZEY:** Pick off the main plaintiff for --

23 **THE COURT:** Yeah. That's what I just said.

24 **MR. ELLZEY:** -- for -- right. For --

25 **THE COURT:** Yeah.

1           **MR. ELLZEY:** Here. Here's \$10,000. The guy'll never  
2 say no to this. And then this big, huge class action --

3           **THE COURT:** Right.

4           **MR. ELLZEY:** -- goes away.

5           And I would never advise my client to reject that.

6           **THE COURT:** And the interesting feature is factually  
7 what you're saying. That's certainly true once the class  
8 action is filed and going.

9           **MR. ELLZEY:** Yes.

10          **THE COURT:** Factually here, as I'm understanding it,  
11 of course, it's not really in your pleading. But as I'm  
12 understanding it factually, Kroger, upon being advised two  
13 months later, you come back with the cards. Hey, there's no  
14 money on here. And I haven't tried to use it.

15          Kroger said, oh, we're sorry. Here, we'll give you  
16 replacement cards. That's prior to the notion that there would  
17 be a class action on this.

18          And that -- that could have meaning. Cause it  
19 doesn't have the same -- they're not a Defendant at that point.  
20 And so they don't have the same intent as a Defendant in a big  
21 commercial class action.

22          **MR. ELLZEY:** Well, they were. The case had been  
23 filed, your Honor, to be clear --

24          **THE COURT:** The case had been filed --

25          **MR. ELLZEY:** -- before --

1           **THE COURT:** -- before?

2           **MR. ELLZEY:** Before there was any offer. So --

3           **THE COURT:** Okay. Well then, okay. Well, I -- I  
4 don't know the facts entirely.

5           That's contrary to what I just heard.

6           **MS. HENDERSON:** That's -- that's not my  
7 understanding. But because --

8           **THE COURT:** Exactly.

9           **MS. HENDERSON:** -- you raised that issue --

10          **THE COURT:** It's thoroughly --

11          **MS. HENDERSON:** -- I'll certainly make sure.

12          **THE COURT:** Okay. That may matter to the --

13          **MR. ELLZEY:** And I'm pretty sure --

14          **THE COURT:** -- issue that we're discussing.

15          **MR. ELLZEY:** I don't want to -- I don't want to say  
16 anything that's not accurate.

17               I'm pretty sure the case was on file.

18          **THE COURT:** Okay.

19          **MR. ELLZEY:** And -- and --

20          **THE COURT:** That's fine.

21          **MR. ELLZEY:** -- that -- that was Kroger's first  
22 response. Fine. You know --

23          **THE COURT:** Okay.

24          **MR. ELLZEY:** -- it's great when Defendants reach out  
25 and want to resolve things.



1 But -- but the point of -- of this discussion is U.S.  
2 Supreme Court says that doesn't moot the case.

3 **THE COURT:** Okay.

4 **(Pause in the proceeding.)**

5 **THE COURT:** Okay. Um --

6 **(Pause in the proceeding.)**

7 **THE COURT:** What else do you want to say, Miss  
8 Henderson, about your attack on the negligence claim?

9 **(Pause in the proceeding.)**

10 **MS. HENDERSON:** I think we discussed it, your Honor.

11 I mean, I -- the main points that we've made are as  
12 to economic loss and the lack of damages for the issues that  
13 we've talked about.

14 **THE COURT:** So, I mean, cause as to -- I -- I'm  
15 saying it from the standpoint of this.

16 Plaintiff is already going to be allowed to replead.  
17 And so, I want to note any concerns that you have about  
18 other -- that there's duty --

19 **(Pause in the proceeding.)**

20 **THE COURT:** -- duty causation, injury --

21 **MS. HENDERSON:** Uh-huh.

22 **THE COURT:** -- all feature into the negligence  
23 claims.

24 So as to duty, is there anything better that  
25 Plaintiff would need to plead as to duty? I just want to make

1 sure that when it's teed up this next time, the best shot the  
2 Plaintiff could take at it has been taken so that if I later  
3 agree with you --

4 **MS. HENDERSON:** Uh-huh.

5 **THE COURT:** -- the dismissal's with prejudice.

6 Otherwise, I just have to let them replead again.

7 **MS. HENDERSON:** I understand, your Honor.

8 **THE COURT:** Okay.

9 **MS. HENDERSON:** I think as to duty, the issue with  
10 their pleadings currently is that, and it also kind of goes to  
11 causation, is that the draining of the cards occurred after the  
12 cards left Kroger's premises, and after they were outside of  
13 Kroger's control.

14 **THE COURT:** Okay.

15 **MS. HENDERSON:** And so, the causation and the  
16 connection aspect of the issue at hand to Kroger is lacking.  
17 And, frankly, I don't think that Plaintiff is going to be able  
18 to fix that, or further address that, by a repleading.

19 And that goes to duty and causation.

20 **THE COURT:** So it's the duty and -- and the  
21 causation. There were facts pleaded as to -- it's known that  
22 some people would come in and scan or take pictures of these  
23 things sitting on the rack.

24 **MR. ELLZEY:** Right.

25 **THE COURT:** It's unknown why they did that, or what

1 that -- but there is at least facts pleaded that hey, you're  
2 aware that people were doing that.

3 **MR. ELLZEY:** Correct, your Honor. And -- and, again,  
4 our --

5 **THE COURT:** Or you should have been aware that people  
6 were doing that.

7 **MR. ELLZEY:** Right. It's -- it's a knew or should  
8 have known.

9 **THE COURT:** Uh-huh.

10 **MR. ELLZEY:** I mean, this is a -- I mean, if you  
11 spend two minutes on-line, you will find that this is a  
12 pervasive nationwide issue, this card draining.

13 **THE COURT:** Uh-huh.

14 **MR. ELLZEY:** So, if -- if a company as sophisticated  
15 as Kroger is, is aware of it, you know, there's -- there's  
16 foreseeability. And I think at that point, it triggers a duty  
17 for Kroger to protect its consumers.

18 They can't just say, give us a hundred bucks, or 20  
19 dollars, and, you know, we're going to sell you this piece of  
20 plastic that may or may not work. They're representing it  
21 does.

22 **THE COURT:** Okay.

23 **MR. ELLZEY:** You get the card that they sell.

24 **THE COURT:** So let's make sure on any repleading that  
25 you have factually -- you are specifying what the duty is. And

1 you're also specifying, you know, subject to the requirements  
2 of what Rule 8, sufficient facts as to what the duty was and  
3 the source from which it arose.

4 **MR. ELLZEY:** Understood.

5 **THE COURT:** So that that can then be responded to by  
6 the Defendants.

7 **MS. HENDERSON:** Well, and, your Honor, another issue  
8 that we addressed in our motion is that for a duty to arise to  
9 prevent criminal activity, it has to be connected to this  
10 Kroger location. It has to be at this Studemont Kroger  
11 location.

12 **THE COURT:** Okay.

13 **MS. HENDERSON:** It cannot be a nationwide allegation  
14 of card draining issues. It has to be that there was a duty  
15 that arose due to prior knowledge and of issues at this  
16 location.

17 **THE COURT:** It could be that. I'm not saying that it  
18 necessarily has to be that.

19 It -- I think that there is, I mean, as I'm  
20 understanding it, your pleading would be every single Kroger  
21 location should know that this is going on. Because it's a  
22 nationwide problem. And here is the background that shows  
23 everyone in a financially responsible position for a big  
24 corporate entity that does something like this, would be aware  
25 that there's this hacking problem.

1           **MR. ELLZEY:** Correct, your Honor. And -- and as I  
2 understand it, and -- and as -- as their motion states,  
3 Kroger's motion states, Kroger's making a Timberwalk (phonetic)  
4 Premises liability argument.

5           That argument's appropriate for summary judgment.  
6 You know, we haven't had any opportunity to gather evidence of  
7 specific instances at this Studemont location, to the extent  
8 we're even required to. We're making a general negligence  
9 claim.

10           But -- but under *Timberwalk*, Texas state law --

11           **THE COURT:** Well, we're clearly not --

12           **MR. ELLZEY:** -- premises liability --

13           **THE COURT:** I mean, I understand premises liability  
14 vis-à-vis negligence when it's someone got physically injured.

15           **MR. ELLZEY:** Right.

16           **THE COURT:** This is a commercial injury. So I don't  
17 know -- I don't know that that necessarily lines up. Perhaps  
18 it does. I haven't looked as closely at that.

19           **(Pause in the proceeding.)**

20           **THE COURT:** So Kroger should just be --

21           **(Pause in the proceeding.)**

22           **THE COURT:** You can't be trying to extend that  
23 doctrine into negligence situations where it doesn't fit.

24           Although, I do understand what you're saying  
25 about -- I have a lot of Walmart cases with people getting

1 attacked in parking lots, and stuff. And you -- I -- I  
2 understand the rules as to that.

3 This is -- this is for criminal activity that's not  
4 Kroger's criminal activity. I understand that. But it's third  
5 parties. But it's different than those types of situations.

6 So --

7 **MS. HENDERSON:** Well, and there's the  
8 foreseeability --

9 **THE COURT:** Uh-huh.

10 **MS. HENDERSON:** -- requirement there.

11 And -- and it's particularly challenging when it's  
12 related to third-party criminals. And -- and it wasn't  
13 foreseeable that it occurred at this location.  
14 For -- and -- and I'm taking it --

15 **THE COURT:** Maybe. It depends on what the pleadings  
16 say as to the generality and the ubiquity of this being a known  
17 phenomenon about these types of cards.

18 I mean, I have, like in mind the idea that yes, I've  
19 kind of heard that this thing -- that this does happen  
20 sometimes. I haven't heard about it. But I'm not in the  
21 position that I need to know about it. That it's just like  
22 this -- such a huge problem that Walgreen, Kroger's, CVS, name  
23 all of your grocery stores and retail outlets that offer these.  
24 They should all be equally undertaking the same duty or  
25 responsibility and care towards their cards that they're

1 offering.

2 But maybe you could plead it that way.

3 **(Pause in the proceeding.)**

4 **MR. ELLZEY:** Understood.

5 **THE COURT:** Okay?

6 **MS. HENDERSON:** Yes, your Honor. I think that -- I  
7 think one nuance, though, is that the way the Plaintiff has  
8 pled it now, is that they have alleged that they're -- a  
9 criminal has come into the store. So there is a physical  
10 presence in the store, rather than some overarching cyber  
11 crime-type situation.

12 **THE COURT:** Uh-huh.

13 **MS. HENDERSON:** And so, I think it is more aligned  
14 with other criminal activity that would occur at a store.  
15 Because that's what they're alleging, is that it is --

16 **THE COURT:** Okay.

17 **MS. HENDERSON:** -- a physical presence in the store.

18 **THE COURT:** Okay. I'm not saying you can't argue it.  
19 And I would certainly take a look at it.

20 I'm just sort of identifying for what better  
21 pleading, and then when you're arguing it back to me, that's my  
22 concern about it is making sure that it fits --

23 **MS. HENDERSON:** Uh-huh.

24 **THE COURT:** -- this type of whatever the final  
25 allegations are on this, the type of criminal activity that

1 premises liability fits.

2 **MS. HENDERSON:** Yes, your Honor.

3 **THE COURT:** And it might. Okay.

4 **(Pause in the proceeding.)**

5 **THE COURT:** All right. We've been over injury and  
6 damages. So I think that's all I have.

7 On unjust enrichment, anything else you want to  
8 argue. It's not an independent cause of action. What else?  
9 Anything else?

10 **MS. HENDERSON:** Well, in their response, they stated  
11 that they are going to refocus an amended pleading on  
12 negligence and breach of warranty, and left out the unjust  
13 enrichment claim instead.

14 **THE COURT:** Okay.

15 **MS. HENDERSON:** And they didn't fully address that  
16 claim in their response. So I'd argue it was waived.

17 **THE COURT:** Okay.

18 **(Pause in the proceeding.)**

19 **THE COURT:** Well it sounds -- and a lot of what we're  
20 talking about here is if you really do zero in on all of this  
21 as breach of warranty, you go at it as to that.

22 When -- when might you know as to U.S. Bank and  
23 whether they're going to be a target here?

24 **MR. ELLZEY:** I -- I believe some discovery would be  
25 required.



1 I'm thinking more likely they will not be. I just  
2 wanted to bring the Court --

3 **THE COURT:** Because why?

4 **MR. ELLZEY:** I -- I -- I think our case is -- is  
5 against Kroger for failing to secure.

6 **THE COURT:** Okay.

7 **MR. ELLZEY:** So U.S. Bank's involvement in this may  
8 be zero. I -- I just wanted to point out to the Court that  
9 it's a potential party.

10 **THE COURT:** They could be. Well --

11 **MR. ELLZEY:** Yeah.

12 **THE COURT:** -- it's one of those things that could be  
13 totally U.S. Bank's fault or personnel behind it that are doing  
14 it.

15 But that's different than whether Kroger had a duty  
16 to secure the cards as you're suggesting.

17 **MR. ELLZEY:** Yes, your Honor.

18 **THE COURT:** So it's that or the warranty --

19 **MR. ELLZEY:** Yeah. There could be --

20 **THE COURT:** -- that's involved in that.

21 **MR. ELLZEY:** Two different cases for that.

22 **THE COURT:** Okay.

23 **MR. ELLZEY:** Yeah.

24 **THE COURT:** Okay.

25 **(Pause in the proceeding.)**

1           **THE COURT:** You know, you're going to have to decide  
2 sooner rather than later as to whether it's just Kroger in this  
3 action or the bank. And I don't know what you mean by saying,  
4 well, I need discovery as to whether to bring someone else in.

5           I think I don't know that you're, I mean, based on  
6 the -- like when you're articulating it now as to what the  
7 theory is, I don't know why it matters that you go get  
8 discovery from U.S. Bank.

9           **MR. ELLZEY:** Sometimes saying things out loud for  
10 me --

11           **THE COURT:** Yeah.

12           **MR. ELLZEY:** -- helps me think.

13           **THE COURT:** Yeah.

14           **MR. ELLZEY:** Or -- and as I stand here now,  
15 I'll -- and for -- for efficiency, I'll say that we will  
16 confine this case to Kroger.

17           **THE COURT:** All right. All right.

18           **(Pause in the proceeding.)**

19           **THE COURT:** Okay. That's clarifying. Thank you.

20           All right. So how much time would you like for  
21 repleading?

22           **MR. ELLZEY:** Um --

23           **(Pause in the proceeding.)**

24           **MR. ELLZEY:** Is -- is 30 days.

25           **THE COURT:** Oh, certainly, yeah. I mean, I'll give

1 you 30 days.

2 MR. ELLZEY: Thirty -- thirty days, maybe, you know,  
3 45 to be safe. Sort of starting --

4 THE COURT: Yeah.

5 (Pause in the proceeding.)

6 THE COURT: Any objections?

7 MS. HENDERSON: No objection.

8 THE COURT: It's all towards -- I'm giving  
9 Plaintiff's their best shot. Because if I am taking up your  
10 motion favorably next time, it will be with prejudice.

11 And so, I want to give that best shot. All right.  
12 Forty-five days.

13 (Pause in the proceeding.)

14 THE COURT: Do we need to set other deadlines? Or  
15 should I just take up the pleading, and then the motion, and  
16 then we set deadlines after that?

17 MS. HENDERSON: I prefer that we take up the motions  
18 and pleadings issues first. And then set deadlines. Just so  
19 we're not -- so we have the issues outlined that may go  
20 forward.

21 MR. ELLZEY: No problem with that, your Honor.

22 THE COURT: Okay.

23 MR. ELLZEY: I think it will be hard to run a -- a  
24 dual track --

25 THE COURT: All right.

1           **MR. ELLZEY:** -- when we don't know what we're dealing  
2 with.

3           **THE COURT:** So -- all right.

4           So 45 days to file the -- and I'll specify date in my  
5 minute entry what -- what that drop dead date is, 45 days out  
6 to file an amended complaint.

7           How much time would you like to bring your motion?

8           **MS. HENDERSON:** Put me at 30 days, your Honor.

9           **THE COURT:** Thirty days to bring the motion.

10          And then it'll be normal response and reply deadlines  
11 after that.

12          The scheduling and docket control order is abated.  
13 And discovery is otherwise stayed, unless there's anything by  
14 agreement that you all want to do.

15          And, I will see you again after the briefing is  
16 complete.

17          **MR. ELLZEY:** Thank you, your Honor.

18          **MS. HENDERSON:** Thank you, your Honor.

19          **THE COURT:** Anything else?

20          **MR. ELLZEY:** No.

21          **MS. HENDERSON:** No thank you.

22          **THE COURT:** All right.

23          **MR. ELLZEY:** Nothing further.

24          **THE COURT:** Thank you.

25          Was your associate the primary writer of the --

1                   **MS. HENDERSON:** Yeah. Well, not -- no -- no one  
2   that's here. But the associate on the pleadings was the  
3   primary writer.

4 THE COURT: Oh, okay.

5                   **MS. HENDERSON:** Yes. She's out of town, otherwise we  
6 would have brought here.

7                   **THE COURT:** All right. Well you can compliment her  
8 then, or him.

9 MS. HENDERSON: Thanks. I will.

10                   **THE COURT:** So, all right. Thanks.

11                   **MS. HENDERSON:** Thank you, your Honor.

12                   **MR. ELLZEY:** Thank you, your Honor.

13                   **THE COURT:** All right. Thank you all very much.

14                   We're adjourned.

15 (This proceeding was adjourned at 11:20 a.m.)

## 16

17 CERTIFICATION

18 I certify that the foregoing is a correct transcript from the  
19 electronic sound recording of the proceedings in the above-  
20 entitled matter.

21 | /s/ Cheryl L. Battaglia

August 22, 2024

22 | Transcriber

Date

23 | 4:24-CV-0478

24 | 08/06/2024 - 08/22/24